

POLICY BRIEF

AT A GLANCE

The draft bill for a Competition Law Digitisation Act provides for further adaptation of competition law with a view to the special features of the digital economy.

- The new types of abuse for companies with paramount cross-market significance should not be introduced in haste.
- In the case of exploitative abuses, a causal link between dominant position and abusive behavior should still be present.
- The companies affected by the proceedings should be required by law to cooperate more strongly if effective enforcement by the antitrust authorities cannot otherwise be ensured.
- An increase in the merger notification thresholds and the associated lowering of competition protection should be combined with a targeted increase of merger review in regional markets.

10th amendment to the Competition Act – meeting challenges in digital *and* regional markets!

The Federal Ministry for Economic Affairs has prepared a draft for a Competition Law Digitisation Act.¹ In the legislative process, the focus of attention should be that German abuse law is not developed further in contradiction to EU law and to avoid an unconvincing regulation of

digital markets. In addition, the connection between retrospective abuse control and prospective merger control should be taken into account. The planned increase in the notification thresholds must not lead to a reduction in the density of control in regional markets.

The Federal Government has set itself the objective of creating a digital regulatory framework. **To this end, the Federal Ministry for Economic Affairs and Energy has drawn up a bill for a Competition Law Digitisation Act (10th amendment to the German Competition Act), which aims, among other things, to further develop the provisions on the abuse of market power.** The bill is intended to improve the system for the enforcement of competition law in a targeted manner. The Monopolies Commission welcomes these efforts.² The draft bill takes up important scientific impulses and findings from case practice, particularly with regard to the assessment of platform business models.³ **From the Monopolies Commission's point of view, however, care must be taken to ensure that the existing German abuse provisions are developed in line with EU law wherever possible and that contradictions with EU law are avoided. Improvements can also be achieved in the area of merger control – going beyond digital markets.**

New prohibitions of abuse for companies with "paramount cross-market significance" not to be introduced in haste

The bill for an Competition Law Digitisation Act includes provisions with which completely new paths are being taken in German cartel law. The ministerial draft bill proposes two new prohibitions, § 19a and § 20(3a), in order to extend the existing right of abuse and to partly prevent characteristic competition problems on digital markets.

§ 20(3a) is directed against structural distortions of competition which can occur if the market **"tips" at a certain threshold due to certain demand-side economies of scale of a platform company.** If competitors of companies with relative or superior market power are prevented from achieving economies of scale themselves, these practices are to be pursued as unfair impediments. The new provision is intended to keep markets open and prevent dominant positions.

In addition, with the new § 19a, the draft bill aims **to cover the formation of digital ecosystems and to prevent platforms from using their market position and the economic power in certain markets strategically to restrict competition in other markets.**⁴ This is intended to address problems that may arise when certain companies establish anti-competitive structures, for example in new markets, without these companies necessarily being already dominant in all these markets.⁵



WHAT ARE DIGITAL PLATFORMS?

The characteristics of digital platforms are considered to be a source of major competition concerns in the digital economy. The essential characteristic of a platform is that its offer targets several groups of different users that interact with each other via the platform. An example is an auction platform that offers a mediation service both to those who want to sell (or auction) something and to those who want to buy something. If the users on one platform side benefit from a higher number of users on the other platform side, so-called indirect network effects exist. In the example of the auction platform, for example, those who want to sell something benefit if many potential buyers use the platform. The larger a platform already is, the more difficult it is for other providers to compete with it. The size of a platform therefore has both positive effects for its users, but also negative effects due to reduced competition. Platform markets are not exclusively found in digital services. However, competition problems can arise here due to the often hardly geographically limited markets and the rapid adaptability of digital offers with particularly high intensity. In order to better capture market power which may arise due to platform characteristics, appropriate criteria have already been included in Section 18 (3a) of the Competition Act.

The draft bill addresses important economic issues in the context of the platform economy. The Federal Ministry for Economic Affairs could rely on two expert opinions for the clarification of these issues, which were used to prepare the amendment of the law. The new provision in § 20(3a) corresponds in principle to a recommendation of the expert opinion on "modernizing the law on abuse of market power". In contrast, the planned § 19a is a far-reaching innovation which in this form has no basis in the preceding expert opinions and which was not preceded by any public discussion either. The new provision combines many individual recommendations of expert reports and (traditional) abuses of platform companies investigated by the competition authorities, but in some cases also goes beyond this.⁶

In order to establish a possible infringement under § 19a, a two-stage procedure must first determine the 'overriding importance of the undertaking concerned for the overall market' and then any abuse. **The concept of "paramount cross-market significance" (para. 1) is so far unknown to German abuse law.**⁷ The prerequisites for such a cross-market significance are, however, **only outlined in § 19a(1) with reference to criteria that are also relevant for establishing a dominant position.** In addition, it is left to the Federal Cartel Office (FCO) to develop criteria for a differentiation from traditional market power. **The abuse groups (para. 2) are broadly defined and address very different types of behaviour.** In this context it will therefore largely be left to the FCO to determine what the common characteristics of abuses under § 19a are. It must be expected that, in the absence of a clear and uniform approach and due to the resulting legal uncertainty, the new provision will keep the courts busy for years until clarification is reached eventually.

With regard to the legal consequences where an abuse has been established, the draft bill refers to the already existing powers of the FCO under §§ 32 ff. of the Competition Act. However, it is unclear whether these anti-trust law powers are sufficient to be able to take effective countermeasures where abusive behaviour by platform companies has a negative impact on the market structure. It is also conceivable that it might be necessary to foresee ongoing monitoring and regulation of the companies' behaviour with instruments that go beyond the existing §§ 32 ff. of the Competition Act.

After all, the provision of § 19a raises a number of fundamental questions. There has not yet been any analysis and discussion of the question, on the basis of which legal criteria a coherent protection of competition can be achieved in the case of emergent platform ecosystems. Apart from that, it is doubtful whether the proposed § 19a can be operationalised at all in a way that will contribute to effective abuse control. The Monopolies Commission is therefore in favour of not putting the provision into force without a more detailed examination within the framework of the current reform project.

Existing abuse provisions to be developed further strictly in line with EU law – requirement of competitive significance to be maintained

In the Monopolies Commission's view, in the further development of abuse law, care must be taken firstly to ensure that German law remains oriented towards the European prohibition of abuse (Art. 102 TFEU) and secondly that the link to competition issues is not weakened. This is because it is important to avoid, as far as possible, the fragmentation of the EU internal market by inconsistent legal standards across borders. Furthermore, it should be borne in mind that Art. 102 TFEU, especially in the digital sector, must in principle be examined alongside German law.⁸ **The draft bill includes a number of substantive provisions which are intended to supplement the right of abuse in the digital sector.**

The proposed recognition in German law of the concept of intermediation power proposed by the scientific community is to be welcomed. A characteristic feature of digital platforms is that they act as intermediaries between user groups. One example is a search platform which brings together searchers and content providers (including providers of advertising content). Another example is a social network which enables similar users to contact and communicate with each other. Such mediation services can lead to dependencies of users on the platform. As a result, the platform can gain competitive leeway in terms of behaviour, provided that there are no competing alternative offers. This problem has already been the subject of several investigations conducted by the FCO.⁹

In view of this, the extension of the subjective scope of application of § 20(1) of the Competition Act to large companies, as proposed in the draft bill, appears sensible. The provision would extend the prohibition of the abuse of market power to all types of competition-relevant dependency relationships. This would not imply any problematic deviation from EU law either. A "dominant position" pursuant to Art. 102 TFEU exists if a company is able to behave independently of other market participants and if this independent behaviour enables it to prevent effective competition in one or more relevant markets.¹⁰ This corresponds to the concept of intermediation power. Hence, contrary to the German legal situation (see § 18(1) of the Competition Act), the finding of a dominant position under Art. 102

TFEU does not necessarily require the definition of relevant markets on which the company in question can act independently as a result of a scope of conduct. Only those relevant markets on which competition is affected need to be defined.¹¹

However, the proposed amendment of the general prohibition of abuse under § 19(1) of the Competition Act is problematic. The draft bill provides for a rewording of the provision so that “[t]he abuse” instead of “[t]he abusive exploitation” of a dominant position by one or more companies shall be prohibited. According to the explanatory memorandum of the draft bill, the amendment serves to clarify **that no qualified requirements in the sense of "strict causality" are to be required for finding an abuse of market power.**¹² The new wording is meant to extend this clarification to all cases of exploitative abuse. However, the intended amendment would not lead to a closer alignment with EU law and would also be questionable from a policy perspective.

With a view to the alignment with EU law, it would be preferable to stick to the current wording of the provision, which is more in line with Art. 102 TFEU. As regards the existing German prohibition of abuse, it was also emphasised in the legislative procedure, at the time it was introduced, that it was “a methodological matter of course” “that the national competition law, which in future will be closely aligned with European law, will have to be interpreted in the light of precisely these European rules”.¹³ German courts have never questioned an interpretation of the law in line with Article 102 TFEU. The FCO can therefore already now base its enforcement practice on Article 102 TFEU.

This would ensure that the relevant interpretation of Article 102 TFEU under Union law is fully incorporated into German law, in particular as regards the question of whether the potentially abusive conduct of a dominant undertaking has the competitive implications required by Union law. According to the relevant case-law of the European Court of Justice (ECJ), Article 102 TFEU prohibits a dominant company “from, among other things, adopting pricing practices that have an exclusionary effect on competitors considered to be as efficient as it is itself and strengthening its dominant position by using methods other than those that are part of competition on the merits.”¹⁴

According to the case law of the European Court of Justice, these means, which deviate from "competition on the merits", can be divided into two groups:

- On the one hand, the question is whether the holder of such a dominant position uses the resulting opportunities to reap economic benefits “which it would not have reaped if there had been normal and sufficiently effective competition”.¹⁵ **This group of cases is particularly relevant in cases of exploitation of consumers.**
- On the other hand, it is a question of assessing conduct which, in principle, any company can pursue. In this case the respective conduct must be considered as a whole and assessed from a competition point of view, i.e. the objectives pursued and the suitability for restricting competition.¹⁶ **This case group is particularly relevant for strategies to exclude competitors (e.g. predatory pricing, discounts).**

The objective of the draft bill is to drop the requirement of a causal link between dominant position and abusive behaviour, which is already practised in the case of exclusionary abuses under European law and is also unproblematic from a policy point of view, since the foreclosure of competitors by a dominant company secures that company’s market position in the end. **In the case of exploitative abuses - which the draft bill explicitly mentions as the target of the proposed amendment - the abandonment of the causal link would, however, lead to legal uncertainty,** for this would eliminate the link between any unfair conduct and competition, which is already weakened by the market structure. **The competition authorities would thus be able to prosecute any violations of the law as abuse of market dominance.**¹⁷

Making the duties of undertakings to cooperate more effective in order to expedite proceedings

Experience in procedures involving large digital platforms has shown the need for faster intervention. In the coalition agreement for the 19th legislative period, the governing coalition has therefore set itself the goal of “noticeably accelerating procedures in general competition law without restricting constitutional guarantees”.¹⁸ The European Commission is also examining ways of speeding up intervention, inter alia by easing the burden of proof for the purposes of administrative proceedings by the competition authorities.¹⁹

The background to these efforts is the fact that platforms, due to their mediating function, act as rule-setters for the interaction of platform users. If users interact with platforms in a dominant position, it is difficult for them to switch to alternative offers. Dominant platforms may therefore be more likely to use their rule-setting function to the detriment of their users. Moreover, if such a platform follows a data-based business model, it **may also have information advantages**, both vis-à-vis its users and vis-à-vis the authorities responsible for protecting users.²⁰ From the outside, it may not be possible to understand for which purposes the platform uses available data to it. It is true that the competition authorities have corresponding comprehensive powers of information in administrative proceedings at EU level and in Germany.²¹ **However, the use of these powers is hampered by the fact that market conditions in the digital sector are changing rapidly and that market players are constantly adapting their behaviour to changing circumstances. This makes it difficult for the authorities to keep pace with the behaviour of the platform companies and other market participants when investigating the facts of the case (moving target).**

These difficulties in establishing the relevant facts collide both at EU level and in Germany with the legal obligation of the cartel authorities to investigate all circumstances which are significant for the individual case and either incriminating or exonerating (inquisitorial proceeding).²² In the light of the situation, the existing law already takes into account potential difficulties in providing evidence that the competition authorities may incur. Pursuant to § 26(2) of the German Code of Administrative Procedure (VwVfG), “the parties involved are expected to cooperate in the investigation of the facts. In particular, they are expected to indicate facts and evidence known to them.” This obligation to cooperate reduces the investigative burden imposed on the competition authorities. This may become particularly relevant in cases of exploitative abuses. In such cases, the case law of the Federal Court of Justice requires the dominant company to “provide the competition authority with the **data from its sphere of influence which the authority cannot reasonably obtain by any other means**”.²³ Although there is no regulation at EU level comparable to § 26(2) VwVfG, it does not appear completely out of consideration, also according to the case law of the European Court of Justice, that in the case of a judicial review, “considerable and at times very great difficulties in working out [relevant facts] must be taken into account” in favour of the competition authority.²⁴

However, these facilitations theoretically available under current law are hardly relevant in practice. In their proceedings, the cartel authorities typically rely solely on their own investigative powers, and must then prove to the court that they have conducted a comprehensive investigation of the facts in the event of a judicial review. One reason for the lack of discussion of difficulties in the determination of facts in German law may be precisely the fact that § 26(2) VwVfG is only a procedural rule to facilitate the provision of evidence, which has hardly been tested in practice and which, if necessary, must be invoked from outside the Competition Act. At the EU level, such a regulation is even completely missing. **The Competition Law Digitisation Act should be taken as an opportunity to anchor an explicit and more detailed provision in the Competition Act, which should be oriented towards the case law of the Federal Court of Justice.** Such a regulation could also serve as a model for the EU level.

The Monopolies Commission therefore recommends adding the following sentences to § 59(2) of the Competition Act, which concerns the duties to provide information in the case of requests for information by the competition authorities: *“Within the period set in the request for information, they must also provide the competition authority with information from their sphere of influence which the authority cannot reasonably obtain by other means. If the deadline is missed, the competition authority may draw conclusions from this within the framework of its free assessment of evidence and decide on the merits of the case without taking the information not provided into account.”*²⁵

Strengthen merger control in regional markets

In the area of merger control, the draft does not provide for any fundamental changes comparable to the changes in abuse law. However, various planned adjustments and innovations of the draft bill are aimed at the criteria for determining whether the FCO has to or can review a merger. These criteria are regularly discussed in the context of amendments to the Competition Act. On the one hand, it is argued that the cost in terms of human resources for industry and the competition authorities is too high due to low thresholds. **On the other hand, there is criticism that, on the basis of the existing thresholds, critical merger cases that potentially raise competition problems cannot be examined under merger control.** Against the backdrop of the concern that turnover

does not adequately reflect the economic significance of a merger, a so-called transaction value threshold was included in § 35(1a) no. 3 of the Competition Act. The legal amendment was made within the framework of the 9th amendment to the Act, inter alia following a proposal by the Monopolies Commission. Following the introduction of the threshold, the transaction value is to be used as a subsidiary criterion for the duty to control a merger.²⁶

The present draft of the 10th amendment to the Competition Act envisages raising the thresholds for merger control and thus lowering the scope of control. Firstly, this concerns the so-called second domestic turnover threshold introduced in 2009 (§ 35(1) no. 2, 2nd half sentence of the Competition Act), according to which the smaller company participating in a merger must have domestic turnover of at least EUR 10 million instead of the previous EUR 5 million. The second change concerns the so-called *de minimis* market threshold (§ 36(1) no. 2 of the Competition Act), according to which, in the context of a merger that has already been notified, the possibility of prohibition is no longer applicable on markets in which sales of up to EUR 20 million instead of the previous EUR 15 million have been achieved. However, in future, the FCO will be empowered to consider several identified minor markets together, i.e. with their total turnover. In addition, a new § 39a introduces an administrative request system under which the review threshold is reduced in certain cases to EUR 250 million (threshold of worldwide sales of the acquirer) and EUR 2 million (threshold of worldwide sales of the target company), where the target company must have generated more than two thirds of its sales in Germany. The new values are to be applied to takeovers by selected companies in individual sectors of the economy. The FCO may determine the companies in advance if there are indications that future takeovers of these companies will cause competition problems in Germany in the respective sectors of the economy.

The draft bill justifies the proposed increase in individual thresholds primarily by allowing for a better use of resources at the FCO and a reduction in the number of cases (second national turnover threshold), which is expected to be justified in international comparison. Moreover, enforcement should concentrate on economically significant cases and adapting to inflation (the *de minimis* market threshold has no longer been adjusted in nominal terms after a considerable increase in 1998).²⁷ In general, especially the second domestic turnover threshold also serves the purpose of strengthen-

ing the requirement that domestically controlled foreign mergers produce a domestic effect. However, it may be questioned whether the envisaged increase of the two thresholds would not also have undesired effects in the opposite direction, in that mergers whose domestic competitive significance is high would no longer be covered.

An undesirable effect could arise in particular with regard to mergers with regional effects only, if these are not or no longer subject to control in the future. Regional markets are present if, from the point of view of the demanders, only suppliers whose services are active in a nearby area are eligible. Regional markets affected by merger control are found, for example, in the health care sector, e.g. medical care centres or hospitals, in the waste disposal industry or in the area of special commercial goods, e.g. petrol stations. In these markets the raising of the above-mentioned thresholds might in individual cases reduce the potential ambit of competition law review if such concentrations were to fall outside the scope of the notification obligation.²⁸ This would not be desirable. The draft bill also uses this problem to justify the new introduction of the administrative request system in § 39a.²⁹

From an economic point of view, there are good reasons to apply stricter criteria, especially in regional markets. This is because, for example, the systematic acquisition of small regional market leaders in a sector by a large nationwide supplier (not controlled because below the thresholds) is from its potential to create competitive damage equivalent to the merger of two large nationwide suppliers (controlled because above the thresholds). Also, the burden on the competition authority to control many mergers in the same industry is less in comparison to the same number of cases with a focus on different industries. Indications also exist that competition is frequently impeded particularly on regional markets. Without effective control, local dominant positions may emerge (so-called stealth consolidation). With reference to the regional market problem, for example, a recent study of raised thresholds in the USA has shown that a considerable increase in mergers occurred there, which can be causally attributed to the lower level of competition control.³⁰

Against this backdrop, **the intended increase in the thresholds for taking up the case in the draft of the 10th Amendment to the Competition Act can be justified with a view to protecting competition if it is ensured at the same time that there is no deterioration in the competitive conditions on regional mar-**

kets. However, there are a number of reasons why the new administrative request system is not an appropriate instrument to address the regional market problem. Notably, the wording of the proposed § 39a does not include any factual elements, which would allow to distinguish successive acquisitions with particular relevance for regional markets from mergers in other markets. Rather, at the level of the facts, the draft bill proposes that special “indications” will in future be required, which indicate that competition may be impeded at national level. The effect of § 39a will consequently depend on the practice of the FCO, will be asymmetrical and chronically retrospective, as well as hardly predictable at all.

Moreover, the proposed administrative request provision will not be able to convincingly contribute to solving other problems discussed but not explicitly mentioned in the draft bill, such as the takeover of start-ups by large digital companies. For example, the domestic reference (2/3 rule) required in § 39a(2) no. 2 will probably not be met in many cases. In addition, start-ups will in principle only be able to generate low revenues at the beginning, so that – should these takeovers come to the fore when applying § 39a – their transactions will normally have to be assessed on low transaction value thresholds instead of revenues. Moreover, mergers in the digital sector are based on frequently changing relevant product markets. In contrast, the draft bill highlights as problematic rather those cases in which a company carries out several acquisitions on the same relevant product market.³¹ There is also a lack of sufficient experience as to how to weight the pro- and anti-competitive effects of acquisitions of start-ups in the digital sector, especially in view of the fact that the acquirer and the target company are not active on the same relevant product market. However, to the extent that such concentrations have not been identified as typically harmful to competition, their closer control is not indicated yet.³² In summary, it must therefore be concluded that the

planned § 39a would create an instrument of intervention at the level of the criteria for taking up the case, which is foreign to competition law and more resembles regulation, the advantages of which do not stand to reason sufficiently yet.

In the Monopolies Commission’s view, the legislator could strengthen the control of regional mergers in a more targeted fashion by increasing the relevant turnover in the case of mergers with a regional focus. A corresponding turnover multiplier could be added to the existing special rules for turnover in § 38 of the Competition Act. The new rule should apply if the parties to the merger increase their sales mostly to local or regional markets. Despite their different sizes, the borders of the federal states (*Länder*) are suitable as demarcation criteria. Even smaller *Länder* are large enough to cover regional markets and larger *Länder* are small enough to prevent the rule from being triggered in the case of nationwide markets. In order to include activities in the border area of several *Länder*, a focal point within three *Länder* should be taken into account as well. In the case of mergers with a corresponding local or regional focus, turnover should be doubled. This would in any case ensure that the planned doubling of the second domestic turnover threshold would not lead to undesirable gaps in merger control.

Instead of introducing the proposed § 39a, the Monopolies Commission recommends adding a new Paragraph 6 to the existing § 38 of the Competition Act, which should read: *“For a merger where at least 90 per cent of the domestic turnover of a party to the merger is generated in no more than three federal states, twice the turnover is to be taken into account. In deviation from this, for the calculation of the threshold pursuant to § 36 para. 1 no. 2, the revenues are to be doubled on a market which geographically does not extend to more than three federal states.”*

¹ Federal Ministry for Economic Affairs and Energy, Referentenentwurf eines Zehnten Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen für ein fokussiertes, proaktives und digitales Wettbewerbsrecht 4.0 (GWB-Digitalisierungsgesetz), date of last edit: 07.10.2019, 18:14 (in the following: „Ministerial Draft Bill“).

² Cf. Monopolies Commission, Special Report No 68, Competition policy: The challenge of digital markets, 1st Ed. 2015, para. 484.

³ Schweitzer/Haucap/Kerber/Welker, Modernising the law on abuse of market power, Final Report of 29 August 2018; Commission “Competition Law 4.0”, A new competition framework for the digital economy, Report of September 2019.

⁴ As regards “economic power”, cf. Art. 2(1) lit. a and b of Reg. No 139/2004 for the area of merger control.

⁵ Ministerial Draft Bill, p. 73.

⁶ See Ministerial Draft Bill, p. 75 ff., expressly referring to recommendations of the Commission “Competition Law 4.0” and EU Commission, Case No. 39.740 – *Google Shopping*; FCO, Case No. B6-22/16 – *Facebook*.

⁷ See, however: UK Government, Unlocking digital competition, Report of the Digital Competition Expert Panel, March 2019, paras no 2.10, 2.17, 2.24 ff.: „establish a digital platform code of conduct, based on a set of core principles. The code would apply to conduct by digital platforms that have been designated as having a strategic market status“; further, see Ministerial Draft Bill, p. 57; Steinberg in: Wirtz/Steinberg, WuW 2019, 606, 611.

⁸ Art. 3(1)(2) of Reg. No. 1/2003; in that context, see also Wouter Wils, The Obligation for the Competition Authorities of the EU Member States to Apply EU Antitrust Law and the Facebook Decision of the Bundeskartellamt, Concurrences N° 3-2019; advance version accessible without charge: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3424592.

⁹ FCO, Order of 22 October 2015, B6-57/15 – *Parship/Elitepartner*, paras 71 ff.; FCO, Order of 23 November 2017, B6-35/17 – *CTS Eventim/Four Artists*, paras 53, 63 ff.; as concerns the criteria of intermediation power, see also: Federal Court of Justice, Judgment of 8 October 2019, KZR 73/17 – *Werbblocker III*, head note b and paras 25 ff.

¹⁰ See ECJ, Judgment of 14 February 1978, 27/76 – *United Brands*, ECR 1978, 207, ECLI:EU:C:1978:2227/76, paras 65-66.

¹¹ Divergent: Schweitzer/Haucap/Kerber/Welker, *ibid.*, p. 30 with fn. 87.

¹² Ministerial Draft Bill, p. 70.

¹³ Bundesrat, Stellungnahme zum Regierungsentwurf zum GWB (7. Novelle), BT-Drs. 15/3640, p. 73, 74-75.

¹⁴ ECJ, Judgment of 27 March 2012, C-209/10 – *Post Danmark I*, ECLI:EU:C:2012:172, paras 21 ff., esp. para. 25.

¹⁵ ECJ, Judgment of 14 February 1978, 27/76 – *United Brands*, ECR 1978, p. 207, ECLI:EU:C:1978:22, para. 249; Judgment of 11 December 2008, C-52/07 – *Kanal 5 and TV 4*, ECR 2008, I-9275, ECLI:EU:C:2008:703, para. 27.

¹⁶ ECJ, Judgment of 27 March 2012, C-209/10 – *Post Danmark I*, ECLI:EU:C:2012:172, paras 26 ff.; Judgement of 6 September 2017, C-413/14

P – *Intel Corporation Inc.*, ECLI:EU:C:2017:632, para. 139; Judgment of 19 April 2012, C-549/10 P – *Tomra et al.*, ECLI:EU:C:2012:221, para. 79.

¹⁷ Monopolies Commission, Biennial Report XXII, Competition 2018, 1st Ed. 2018, para. 676.

¹⁸ Ein neuer Aufbruch für Europa. Eine neue Dynamik für Deutschland. Ein neuer Zusammenhalt für unser Land; Koalitionsvertrag zwischen CDU, CSU und SPD, 19. Legislaturperiode, 2018, paras 2756 ff.

¹⁹ Espinoza/Fleming, Margrethe Vestager eyes toughening ‘burden of proof’ for Big Tech, Financial Times of 30 October 2019. Similar measures have also been proposed for US law; see Fox, Platforms, Power and the Antitrust Challenge: A Modest Proposal to Narrow the U.S. – Europe Divide, 98 Neb. Law Rev. 102, 121 (2019).

²⁰ Cf. Crémer/de Montjoye/Schweitzer, Competition Policy for the digital era, Final Report, 2019, pp. 60-62.

²¹ See Art. 18 of Reg. No 1/2003 and § 59 of the German Competition Act.

²² See § 24 of the Code of Administrative Procedures (VwVfG) in German law.

²³ Federal Court of Justice, Order of 14 July 2015, KVR 77/13, para. 30.

²⁴ See ECJ, Judgment of 14 February 1978, 27/76 – *United Brands*, Slg. 1978, 207, ECLI:EU:C:1978:2227/76, paras 254-256.

²⁵ Regarding this wording, see: Federal Court of Justice, Order of 14 July 2015, KVR 77/13, para. 30; and § 70(3)(2) of the German Competition Act.

²⁶ Monopolies Commission, Special Report No 68, Competition policy: The challenge of digital markets, 1st Ed. 2015, para. 461.

²⁷ With regard to the thresholds of the *de-minimis* market clause, however, the shift to substantive merger control in 2012 must be taken into account. From an economic point of view, this should have resulted in a lowering of the threshold value. Monopolies Commission, Special Report No 63, Die 8. GWB-Novelle aus wettbewerbspolitischer Sicht, 1st. Ed. 2012, para. 62.

²⁸ The Monopolies Commission is aware of three recent cases, e.g. in the waste management sector, which were in the phase II procedure and in which the target company achieved sales of less than or only just over 10 million (second domestic sales threshold). With regard to the *de-minimis* market clause it should be pointed out that the FCO has confirmed on several occasions that this clause has prevented the examination of mergers/markets in the waste disposal sector.

²⁹ Ministerial Draft Bill, p. 100.

³⁰ Wollmann, Thomas G., Stealth Consolidation: Evidence from an Amendment to the Hart-Scott-Rodino Act, AER: Insights 2019, 1(1): 77–94.

³¹ Ministerial Draft Bill, p. 99.

³² The draft bill even explicitly rejects the introduction of a special criterion for takeovers of start-ups by large digital companies (p. 60). However, it also refers to the expert opinion of Schweitzer/Haucap/Kerber/Welker, who propose a material criterion for better consideration of corresponding acquisition strategies (p. 122 ff.).

The Monopolies Commission is a permanent, independent expert committee which advises the German federal government and legislature in the areas of competition policy making, competition law and regulation. The Monopolies Commission has five Members appointed by the Federal President based on a proposal of the German government. Prof. Achim Wambach, Ph.D. is the chairman of the Monopolies Commission.

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